

1 Board. All the parties agree that this should be certified to  
2 -- this discrete legal issue should be certified to the  
3 Commission.

4 JUDGE STIRMER: Who's going to do the -- who's going  
5 to take an appeal?

6 MR. PAPER: KLON.

7 JUDGE STIRMER: The only two people -- suppose the  
8 Bureau refuses to take an appeal. Then what happens?

9 MR. PAPER: Well, it won't happen that way because,  
10 number one, I'm confident, again I don't speak for the Bureau,  
11 but I -- my guess is the Bureau you can see their vacillation  
12 and they're not sure what to do. I think -- we've had  
13 conversations, I believe -- and if you want maybe we should  
14 delay it to see if the Bureau would agree to certify it. But  
15 my guess is the Bureau would want to have this matter  
16 certified and have Commission guidance on it. I think the  
17 Bureau would feel better having a Commission decision advising  
18 them how to, how to deal with the situation.

19 So, that's number one. But even if the Bureau  
20 didn't do that, you have KLON. KLON has filed a petition to  
21 intervene. KLON --

22 JUDGE STIRMER: I denied that petition.

23 MR. PAPER: Well, but they still have a right to  
24 appeal that.

25 JUDGE STIRMER: They haven't. They have no basis to

1 intervene into this case presently. They don't have an  
2 application here -- they're not before me.

3 MR. PAPER: But they could take an appeal of your  
4 decision and go take it to the Review Board. In either, in  
5 either event, in either event we could certify it to the  
6 Commission. I'm saying what I'm concerned about is the  
7 following. You -- when we designate this thing for hearing,  
8 you have a hearing, that takes time, a lot of money, you come  
9 out with a decision. Your decision is going to focus not on  
10 the issues we're discussing today. You're going to focus on  
11 other issues, 307(b), you'll focus on, on the other kinds of  
12 issues that are considered in noncommercial comparative  
13 proceedings. And Your Honor knows I'm sure also that the  
14 criteria that are applied in noncommercial proceedings are not  
15 exactly settled, there's a lot of debate swirling around those  
16 as well. Maybe not to the same extent as in the commercial  
17 arena. So what will happen is, then appeals are taken to the  
18 Review Board. Well, the Review Board has this legal issue  
19 we're talking about now, but it has all these other issues  
20 here concerning the comparative criteria utilized in  
21 noncommercial cases. What's the Bureau going to do?

22 JUDGE STIRMER: You yourself indicate there would be  
23 a 307(b) issue probably.

24 MR. PAPER: Right.

25 JUDGE STIRMER: So if the case is decided on a

1 307(b) issue you don't even have to deal with the comparative  
2 issues.

3 MR. PAPER: Yeah, that -- but I can't be assured how  
4 that's going to turn out, and that's what I'm saying. The  
5 Bureau -- the Board in my view will look at that issue just --  
6 they will look at that issue to see if they can resolve the  
7 case without addressing this, this legal issue that you and I  
8 are discussing right now. So that's going to take time. And  
9 if things go wrong then we would then have to appeal to the  
10 Commission and we'll be right back where we were.

11 I'm just saying the bottom line to this is, Your  
12 Honor, I don't think -- I understand where you're coming from  
13 and your, your thought obviously has a reasonable basis, but I  
14 don't think you can be assured that doing it your way will in  
15 fact save time, in fact, it may take longer to have the matter  
16 resolved.

17 MR. SCHONMAN: Your Honor, I would just to comment.

18 JUDGE STIRMER: Sir?

19 MR. SCHONMAN: You have pointed out the infirmities  
20 in, in, in Mr. Paper's proposal. I think it's -- it borders  
21 on the ridiculous to suggest that you should grant the Santa  
22 Monica application with full knowledge that it's going to  
23 precipitate a new round of litigation. I mean, that is not  
24 why you would grant an application. The only, the only reason  
25 that you would grant an application is if you believe that the

1 public interest would be served that this applicant is  
2 qualified and he should be begin building, he should be  
3 granted a construction permit. And if you can't reach that  
4 conclusion that he's fully qualified and not in conflict with  
5 anyone else, then by all means grant it, but I don't think you  
6 can reach that conclusion knowing full well --

7 JUDGE STIRMER: Well, how do I advance this case to  
8 get it resolved? That's what I want to do. I want to get  
9 this case off my docket and resolved as quickly as I can.

10 MR. SCHONMAN: I think Your Honor, following the  
11 express language of the rules that I've suggested, 73.3605 --

12 JUDGE STIRMER: I am not inclined to send this back  
13 to the processing line. I'll tell you that right now, Mr.  
14 Schonman. I am not inclined to do that. I'll have to read  
15 the rule, I'll have to read the case that Mr. Paper cited, but  
16 I am sitting here not inclined to return this to the  
17 processing line because that will not advance the resolution  
18 of this case. In my judgment, you have to act and do  
19 something with that other application, that's what's going to  
20 advance this case. Not putting the other application  
21 backwards.

22 MR. SCHONMAN: Your Honor, as I said before, I  
23 certainly don't want to repeat myself, but by following the  
24 rules section which requires you to put -- send it back to the  
25 processing staff --

1 JUDGE STIRMER: Well, Mr. Paper tells me that the  
2 Commission in interpreting that rule says that's not required.  
3 Have you read that case -- distinguish it?

4 MR. SCHONMAN: Your Honor, the 1961 case says that  
5 it's sent -- is the report and order --

6 JUDGE STIRMER: How about the Los Americas case that  
7 Mr. Paper cited?

8 MR. SCHONMAN: Your Honor, that's, that's not even  
9 on point. That doesn't even discuss Section 73.3605 does it,  
10 Mr. Paper? It doesn't even mention that. It has --

11 JUDGE STIRMER: It mentions the, the amendment of an  
12 application and the retention of that application changing  
13 cities in the, in the hearing. Doesn't send it back to the  
14 processing line. What, did the Commission overlook its own  
15 rules?

16 MR. SCHONMAN: Your Honor, what we have is a case  
17 which is directly on point with the rule. We have an amended  
18 application which was, which was designed to remove a  
19 conflict. I mean, the whole rationale for 3605 was if an  
20 applicant comes in and he amends his application to remove  
21 himself from a hearing, then there's no further reason why  
22 that amended application should be before the judge.

23 JUDGE STIRMER: It's always been before the judge,  
24 Mr. Schonman. They've never treated it this way. Isn't that  
25 right?

1 MR. SCHONMAN: That's correct. The --

2 JUDGE STIRMER: In every single case where this has  
3 occurred they've never gone back to the processing line that  
4 I'm aware of. They've always been dealt with in the hearing  
5 context.

6 MR. SCHONMAN: You're absolutely right, and it has  
7 not been a problem until now, Your Honor. All I am asking,  
8 and I really want to, to, to respond to what Mr. Paper said  
9 about the -- about relying on Commission rules and we're not  
10 relying on the Commission's rules, what I'm suggesting to Your  
11 Honor is that we do in fact rely on the rule and the rule  
12 directs a certain action in this case. If we haven't followed  
13 that practice in the past then that perhaps has been a  
14 mistake. And I think the mistake has resulted in this very  
15 situation we have now with a competing application.

16 MR. PAPER: Your Honor, could I add a this point?

17 JUDGE STIRMER: Well, how would that advance this  
18 case, Mr. Schonman? Tell me how.

19 MR. SCHONMAN: Your Honor, the Santa Monica  
20 application would be sent back to the processing line, placed  
21 on cutoff. The Santa Monica application and the KLON  
22 application would be consolidated for hearing with any other  
23 applications that might come in response to the cutoff and  
24 that hearing would move forward.

25 JUDGE STIRMER: What do you say about his --

1 Mr. Paper's argument that that's not at all required that this  
2 application filed by the Long Beach station is not timely  
3 filed?

4 MR. SCHONMAN: Your Honor, the, the rule does  
5 require this action. The rule expressly talks about the very  
6 situation we have here. I can understand why, why Mr. Paper  
7 is upset. It's fully understandable. What I'm suggesting to  
8 Your Honor is that you rely on a Commission rule and that  
9 happens to be --

10 JUDGE STIRMER: A rule that you yourself concede has  
11 never been used in this type of a situation?

12 MR. SCHONMAN: Well, it's not been used to my  
13 knowledge, but I, I would suggest that it, it does not serve  
14 the public interest to perpetuate a practice which is at  
15 variance with the rules.

16 JUDGE STIRMER: Mr. Paper?

17 MR. PAPER: Well, I have a couple quick comments,  
18 Your Honor. First of all, I find it ironic that the Bureau is  
19 now talking about following the strict language of a rule in  
20 this case but they didn't seem so quick to follow the strict  
21 reading of a rule when it comes to the definition of public  
22 notice. There they were willing to ignore the -- what the  
23 rule explicitly says and in a way unlike this rule the  
24 definition of public notice has applied in Section 1.4, has  
25 been consistently applied. Courts apply it, the Commission

1 applies it, public notice is defined by the release of a  
2 document in nonrule-making proceedings.

3 JUDGE STIRMER: Well, the public notice issue is  
4 something that has nothing to do with Mr. Schonman's reliance  
5 on this rule.

6 MR. PAPER: But I -- and I would say to Your Honor  
7 this. This goes back to the point I said before about having  
8 the Commission have the benefit of everybody's arguments on a  
9 particular point. I do not agree, even though I haven't had a  
10 chance, I'll be honest, to exhaustively research this issue,  
11 even on the little I know because Mr. Schonman brought this to  
12 my attention last night, I can tell you we don't agree and  
13 why? Because the case law I believe is clear, that the  
14 Commission's practice in interpreting its own rules is given  
15 considerable weight in deciding what the rules mean. And  
16 here, and I don't know how long this practice stretches back,  
17 but I would say it stretches back at least 15 years if not  
18 longer, that the practice has been as Your Honor described.  
19 That Section 73.3522(b) post-designation amendments, has been  
20 interpreted to mean that when an applicant does what we did,  
21 the applicant is not returned to the processing line. And so  
22 that Commission practice which has gone on for all these years  
23 and has resulted in the Bureau's staff giving advice to  
24 clients like mine is entitled to wait in deciding what that  
25 rule means as well as what Section 73.3522(b) means.



1           Now, so therefore I do not believe that the rule is  
2 as clear as Mr. Schonman says. I don't think you could just  
3 take a rule, pull it out of context, read the language and say  
4 you know what it means when it hasn't been interpreted that  
5 way by the Commission itself over the last 40 years.

6           So, but I go back to my original point to you. I  
7 believe that it is -- it would be unfair to require a hearing  
8 before this particular issue -- this legal issue is resolved.  
9 And I think that if Your Honor does not like my suggestion,  
10 and I know -- I understand why you don't like it and I grant  
11 you and I agree with Mr. Schonman, I wouldn't call it  
12 ridiculous. I would try -- I would prefer to call it  
13 something creative to respond to a situation which the Bureau  
14 acknowledges has never been arisen -- arisen before.

15           So, the rules don't -- I agree the rules cover me,  
16 but in order -- and we're talking about a procedural mechanism  
17 to -- like Your Honor says advance forward, let's get  
18 something resolved. I would, I would suggest that I think my  
19 proposal -- the one advantage of my proposal is it does  
20 advance the ball, it moves the application down the stream and  
21 people have to make whatever arguments they want including the  
22 Bureau. If the Bureau thinks you're wrong and if the Bureau  
23 thinks this rule should be interpreted the way Mr. Schonman  
24 does, the Bureau can take an appeal, the Bureau can ask that  
25 this discrete legal issue be certified. And there are ways to

1 try and get the matter advanced if they want to have the issue  
2 resolved. I grant you that sometimes matters to sit at the  
3 Commission for a while, but this is AT&T's acquisition of  
4 McCaw. This is a relatively discrete issue that hopefully can  
5 be resolved relatively quickly. And I think that my proposal  
6 albeit unusual, I'll be the first -- probably unique, but it  
7 relies on the Commission's existing procedures to get the  
8 matter before the Commission and allow Mr. Schonman and I and  
9 KLON to present our arguments on this issue should be  
10 resolved.

11 I'm prepared to listen to any other proposal that  
12 will -- that absent the Bureau's decision to get the matter  
13 before the Commission, some other certification procedure. I  
14 think if we -- the rules, I would say this to Your Honor.  
15 Rules are rules, but the fact of the matter is, the Commission  
16 must and does have the flexibility to bend the rules, and I  
17 don't say that in a pejorative way, to bend the rules to adapt  
18 or respond to unusual circumstances. There are things,  
19 waivers of rules as Your Honor know, and I think this is one  
20 those situations where some creativity must be applied in  
21 dealing with what we all agree is an unusual situation. And I  
22 think we try and to -- resort to business as usual, I think  
23 that would be unfair to everybody.

24 So, I'm suggesting that if -- my proposal has  
25 advantage -- nobody I guarantee you -- the grant is not going

1 to become final because it will go to litigation. It will  
2 advance forward, it will move this thing forward to getting  
3 this legal issue resolved. Now, if there is some other  
4 alternative to get there not having it certified to the  
5 Commission, of having this issue certified by you, then let's  
6 do that. In fact, Your Honor could certify it. I think --  
7 the rules don't explicitly provide for it, I know, but we --  
8 as I say, we're presented with an unusual situation and, and I  
9 think that what my proposal does is gets it to the Review  
10 Board which does have the power to certify matters to the  
11 Commission. And you could -- that's why I'm suggesting this,  
12 because you could write an opinion which would acknowledge the  
13 unique character of the situation, the Bureau is going to read  
14 it. They're very responsible, capable people over there.  
15 They could take your order, they can read it and they can see  
16 what it says and you say we have an unusual situation, I think  
17 this should be decided by the Commission to the extent the  
18 parties want and I recommend that the Bureau -- the Board  
19 certify it and all the parties can agree and then it will be  
20 certified.

21 JUDGE STIRMER: Let me ask Mr. Schonman this  
22 question. If I elect not to send this back to the processing  
23 line, but this I mean Mr. Paper's application, will the Bureau  
24 process the other application and make a determination of  
25 whether or not it belongs in the hearing or whether it's

1 | untimely filed?

2 |           MR. SCHONMAN: Your Honor, I can't state definitely  
3 | what course the Bureau would take. I just don't have that  
4 | information before me. Your Honor has directed in a previous  
5 | conference that the Bureau process the application.

6 |           JUDGE STIRMER: And nothing has bene done with  
7 | respect to that.

8 |           MR. SCHONMAN: Nothing, nothing has been done  
9 | because we were very hopeful that the parties would be able  
10 | to, be able to hammer out a settlement agreement. That has  
11 | not happened. Your Honor, I don't think the proper course is  
12 | to grant the Santa Monica application under the circumstances.

13 |           JUDGE STIRMER: Well, I, I agree with you. I am  
14 | reluctant to do that and I'm reluctant to send the, the  
15 | application back.

16 |           MR. SCHONMAN: Your Honor, if, if you certify any  
17 | question to the Commission, I think the question should be  
18 | whether you're required to send it -- send the Santa Monica  
19 | application back to the Bureau for processing. I, I think  
20 | that is the question now.

21 |           JUDGE STIRMER: I don't want to certify anything.  
22 | Believe me, I, I know this Commission and that is not in my  
23 | judgment the best and quickest way to resolve anything.

24 |           MR. SCHONMAN: And I'm not suggesting that. I'm  
25 | suggesting that as an alternative to, to

1 Mr. Paper's proposal. But I certainly agree. I don't think  
2 that certification is the proper course. I think the proper  
3 course is to get, to get these two applications consolidated  
4 and the, and the way to do that is to follow the letter of the  
5 rule.

6 JUDGE STIRMER: Well, the -- all you need to do,  
7 Mr. Schonman, if you believe that this application that's been  
8 filed recently last year by the Long Beach station is mutually  
9 exclusive with the pending application that's before me, then  
10 all you need to do is consolidate it in with this case,  
11 designate the appropriate issues and let me take care of it.

12 MR. SCHONMAN: I don't think that that resolves the  
13 question of notice, notice to the community that Santa Monica  
14 has changed channels.

15 JUDGE STIRMER: I have issued public notices in the  
16 extent of orders that have reflected this information. Isn't  
17 that public notice?

18 MR. SCHONMAN: I'm talking about a cutoff list, Your  
19 Honor. I mean, the type of notice that we're talking about is  
20 an opportunity for competing applicants to file, to file an  
21 application. What, what you're talking about is, is notice  
22 that you have accepted an amendment.

23 JUDGE STIRMER: The notice such as you've described  
24 has never been used in the past in these type of situations.  
25 Isn't that right?

1 MR. SCHONMAN: To my knowledge, that has not been  
2 the course. That is right.

3 JUDGE STIRMER: But why, why should we start now?

4 MR. SCHONMAN: Because I submit that according to  
5 this rule that would appear to be the proper course to take.  
6 The rules I think contemplate sending Santa Monica's  
7 application back to the processing line.

8 JUDGE STIRMER: What does the rule say? Please read  
9 that rule again. I haven't read it all.

10 MR. SCHONMAN: 73.3605(b)(3), "In any case where a  
11 conflict between applications will be removed by an agreement  
12 for an engineering amendment to an application, the amended  
13 application shall be removed from hearing status upon final  
14 approval of the agreement and acceptance of the amendment."

15 JUDGE STIRMER: Removed from hearing status?

16 MR. SCHONMAN: Yes. Now, let me explain that.

17 JUDGE STIRMER: Does it say to go back to the  
18 processing line?

19 MR. SCHONMAN: Let me explain that, Your Honor. In  
20 Report and Order 20 R.R. 2nd, page 1669, at paragraph 9, this  
21 is a 1961 report and order, I'd like to read paragraph 9 to  
22 you. The section that I just read from the Commission's rules  
23 used to be Section 1.363, and let me quote from paragraph 9 of  
24 the report and order, "The amended Section 1.363 also takes  
25 specific note of those cases where a conflict between

1 applications would be removed by an agreement to file an  
2 engineering amendment to an application. Where such an  
3 agreement is approved and the amendment is accepted, the new  
4 rule specifically provides that the amended application will  
5 be removed from hearing status and returned to the processing  
6 line. This is in accord with past Commission procedure in  
7 such cases."

8 JUDGE STIRMER: Now, when was this rule adopted?

9 MR. SCHONMAN: 1961.

10 JUDGE STIRMER: And when was the amendment rule  
11 adopted making the distinction between predesignation  
12 amendments and post-designation amendments?

13 MR. SCHONMAN: Your Honor, I don't know. I don't  
14 know when 3522 --

15 JUDGE STIRMER: If that amendment -- the  
16 Commission's amendment rule was enacted after this rule, would  
17 that make a difference? Would it by implication supersede  
18 this rule?

19 MR. SCHONMAN: No, I don't think so, Your Honor,  
20 because --

21 JUDGE STIRMER: What is the -- then what is the rule  
22 with respect to post-designation amendments talk about going  
23 back to the processing line?

24 MR. SCHONMAN: 73.3522(c) says "Notwithstanding the  
25 provisions of paragraph of this section and subject to

1 compliance with the provisions of 73.3525," that's the section  
2 pertaining to settlement agreements, "a petition for leave to  
3 amend may be granted provided it is requested that the  
4 application as amended be removed from the hearing docket and  
5 returned to the processing line." That's part (c) of 73.3522.

6 JUDGE STIRMER: That's if it's requested. A request  
7 must be made under that section to send it back by the person  
8 proposing the amendment.

9 MR. SCHONMAN: And 3605 requires you to do so.

10 JUDGE STIRMER: What does (b) say?

11 MR. SCHONMAN: (b) of 73.3522?

12 JUDGE STIRMER: Of the amendment, the amendment rule  
13 regarding --

14 MR. SCHONMAN: That involves post-designation  
15 amendments.

16 JUDGE STIRMER: And what does it say?

17 MR. SCHONMAN: I could read the whole thing, it's  
18 several paragraphs long, but to summarize, it explains the  
19 criteria necessary for Your Honor to accept an amendment, what  
20 has to be shown to an accepted amendment.

21 JUDGE STIRMER: And it doesn't make any distinction  
22 between major or minor amendments?

23 MR. SCHONMAN: It's silent on that issue. But I do  
24 want to bring something else to your attention. Section  
25 73.3573, that's the section which pertains to processing FM



1 station applications. Now, part (c) of that rule section  
2 addresses the subject of new file numbers for post-designation  
3 amendments, and it says "Where an amendment to an application  
4 would require a new file pursuant to paragraph (b) of this  
5 section, the applicant will have the opportunity to withdraw  
6 the amendment at any time prior to designation for hearing if  
7 applicable, and may be afforded subject to the discretion of  
8 the Administrative Law Judge an opportunity to withdraw the  
9 amendment after the designation for hearing." That section  
10 appears to contemplate that there are circumstances when a new  
11 file number is required for a post-designation amendment. In  
12 other words, when you take all these sections together it  
13 suggests that there's a mechanism in place where amended  
14 applications are sent back to the processing line for  
15 processing. If it's a minor amendment and it does not need a  
16 new file number, it can be expeditiously granted by the  
17 operating bureau. If it's a major amendment and it requires a  
18 new file number under the rules, then it'll go on cutoff and  
19 consolidated for a hearing with any other competing  
20 applications. I mean, the rules appear to contemplate the  
21 very situation we have, albeit it has not been followed and,  
22 and I agree with you. If presiding judges for the past years  
23 have "blinked" and tended to ignore the rules section --  
24 JUDGE STIRMER: No, no, Mr. Schonman. The Bureau  
25 has supported these resolutions without the return of the

1 applications to the processing line.

2 MR. SCHONMAN: That's correct.

3 JUDGE STIRMER: And the Bureau on no occasion up to  
4 this moment has ever to my knowledge made reference to this  
5 particular rule that you cited this morning.

6 MR. SCHONMAN: Your Honor, I can't argue with that.  
7 I have to agree with that, and we are now faced with, with the  
8 results of, of those actions. We have -- we now have the  
9 situation wherein --

10 JUDGE STIRMER: And while I'd like to think that all  
11 the Administrative Law Judges here at the Commission are fully  
12 cognizant of each and every rule that the Commission has,  
13 occasionally they forget one or two of them and I'm glad that  
14 you called this one to our attention. Yes, Mr. Paper?

15 MR. PAPER: Well, first of all, Your Honor, again,  
16 this only underscores why it's important to get this certified  
17 to the Commission. Mr. Schonman's interpretation of these  
18 rules is wrong in my view. This rule Section 73.3573(c), let  
19 me just read it to you again. It says, "Where an amendment to  
20 an application would require a new file pursuant to paragraph  
21 (b) of this section, the applicant will have the opportunity  
22 to withdraw the amendment at any time prior to designation for  
23 hearing if applicable, and may be afforded subject to the  
24 discretion of the Administrative Law Judge an opportunity to  
25 withdraw the amendment after designation for hearing." This

1 was a recently adopted amendment. The purpose of it is clear.  
2 A person comes in and files an amendment, let me give you a  
3 simple example I think we would agree to, transfer of  
4 control. You have an applicant here, he decides -- proposes  
5 an amendment where control of the applicant will change hands.  
6 That's going to kick that, that applicant right out of that  
7 hearing. What happens? The Commission said, look, we're  
8 going to give people some notice before they get sent back to  
9 the processing line and have to go through the hearing again  
10 so we're going to give them an opportunity to withdraw their  
11 amendment so they don't suffer this harsh result. And let me  
12 finish.

13 MR. SCHONMAN: I agree.

14 MR. PAPER: Okay, that's -- just say I agree and --

15 MR. SCHONMAN: I agree there are circumstances where  
16 an amendment may be filed which would not remove a conflict.  
17 And if it would require a new file number, then the applicant  
18 has the opportunity to withdraw that amendment.

19 MR. PAPER: Okay, well, let me --

20 MR. SCHONMAN: But we have a situation here where  
21 this amendment was designed to remove a conflict.

22 MR. PAPER: Let me just continue on. What's going  
23 on here? Let's take a step back. I mean, folks, what's  
24 happening here? The Commission is interested in expediting  
25 hearings, not prolonging them. It is preposterous -- with all

1 due respect, Mr. Schonman, it is preposterous to suggest that  
2 a party comes in, has a, has -- designated after two years of  
3 waiting, is designated for hearing, comes up with, with a  
4 settlement agreement and then as Mr. Schonman is now proposing  
5 is supposed to go back to the processing line and expose  
6 itself, and KLON I might add, to additional competing  
7 applicants? We might have one, two, three, four, five  
8 different applicants, and subject itself to the uncertainty  
9 and delay of, of a bigger hearing? The Commission made some  
10 mistakes, some of its rules don't work perfectly, but it is  
11 hard to imagine that any common -- in this day and age that  
12 any common-sense, or even in that day and age, that the  
13 Commission would have proposed a rule that would operate in  
14 that way. The section 73.3525 which governs settlements was  
15 designed, and as Your Honor knows, to expedite the resolution  
16 of proceedings, expedite service to the public. That's what's  
17 going on here. And that's what -- and that's the whole spirit  
18 in which all these rules I think are to be viewed. And this  
19 rule 73.3573(c), it's the same thing. What is it? It's  
20 designed to be fair to the applicant and it's designed to say  
21 to the applicant we're not going to subject you to that  
22 further hearing.

23 But I go back to what I said before, Your Honor. I  
24 don't expect Mr. Schonman to agree with everything I say. I  
25 certainly don't agree with everything he says. I think that I

1 would urge Your Honor to -- on your, on your own motion or to  
2 accept some motion from us, some alternative, some procedure  
3 that will get this legal issue to the Commission because that  
4 is really the fair way to do it. We're all groping about in  
5 the dark here, not in my mind. In my mind, the result is  
6 clear but stepping back from an institutional perspective,  
7 we're all groping around in the dark because the plain and  
8 simple fact is the Commission rules and Commission practice  
9 and procedure don't allow this case to be pigeon-holed into  
10 any one of these rules. We can all make arguments and you've  
11 heard a lot of them today this morning.

12 I think that it's the kind -- it's precisely the  
13 kind of thing where the Bureau and Your Honor cannot -- I  
14 think -- let me back up. I think the precedent -- to the  
15 extent there's precedent, the precedent supports our position  
16 that settlement agreement is final, public notice has been  
17 given, that's the end of it. You don't have the discretion in  
18 my view to do anything else. To the extent the rules are  
19 followed strictly, that should be the result and I think that  
20 there is ample basis for that.

21 But I know Your Honor -- I understand Your Honor's  
22 reluctance to proceed that way although I do think that that's  
23 what's dictated by the rules. But to the extent Your Honor  
24 feels a little uncertain because it's a unique situation, it's  
25 precisely the kind of thing that calls for a Commission

1 decision, a Commission guidance and I think we will all be  
2 better off, we'll all feel a lot happier to just get the thing  
3 before, you know, the Commission and we can have a decision.  
4 It will take time, yes, but I don't know if we're going to  
5 save any time by going to hearing. But I do know we will save  
6 a lot of money by not going to hearing immediately and we'll  
7 get a Commission decision. And Mr. Schonman will have an  
8 opportunity to respond to my views and I'll have an  
9 opportunity to respond to his and KLON will easily have an  
10 opportunity to contribute it's two cents on he issues. And  
11 the Commission will have everybody's point of view, the  
12 Commission will make a decision and then that will be behind  
13 us. And I think really that is the proper way -- that is  
14 really what should happen here. We've spent -- I've spent the  
15 last eight months, it's March, eight months, we all have --  
16 I've probably lived with this a little more than Your Honor,  
17 but I spent the last eight months, you know, trying to come up  
18 with a solution which unfortunately has not worked and I go  
19 back to what I --

20 JUDGE STIRMER: Well, I'm very disappointed that the  
21 case has not been resolved in some manner that can accommodate  
22 reasonably the interests of the two pending applications.

23 MR. PAPER: Well, me too, and I'm, and I'm saying --  
24 what I'm proposing now does not preclude settlement. We  
25 can -- no matter, at any point in time we can settle it.

1 JUDGE STIRMER: Well, I -- that's, that's -- I'm  
2 going to tell you something now. The biggest spur to a  
3 settlement is a designation of a case for hearing in my  
4 judgment. Not sitting around on the processing line or  
5 elsewhere. And I would suggest to the Bureau very strenuously  
6 that if this case is designated for hearing chances of  
7 settlement will be greatly enhanced.

8 MR. PAPER: Well, I don't know. See, if I can  
9 respond to that, Your Honor. Problem is, like I said, it's  
10 really just a question of engineering, you know, that's really  
11 what it comes down to, coverage. And, you know, my client is  
12 prepared, it prepared to settle but they don't want to lose a  
13 substantial amount of coverage and, and settle and get  
14 something that's not worth having. The unfortunate thing is  
15 the principal population coverage, I think I got my directions  
16 straight here, I think it's to the south or the southeast or  
17 southwest, I guess, and that unfortunately is the area where,  
18 you know, the contra keeps fluctuating and so that's, that's  
19 the problem of the case from an engineering perspective.

20 I would suggest -- you know, we could suggest that  
21 we come back in a short period of time and see if it'll settle  
22 but I don't think -- and maybe we will come up with some  
23 settlement. But I would suggest that -- go ahead.

24 JUDGE STIRMER: Mr. Schonman?

25 MR. SCHONMAN: Your Honor, the Bureau has every

1 interest in, in expediting cases and seeing that new services  
2 are provided or expanded, services are provided. We have no  
3 reason to, to want to hold back this case for any reason. So,  
4 so that extent I agree with, with Mr. Paper that, that moving  
5 the case along is, is very important. I have nothing more to  
6 add on the substance of the argument other than I would urge  
7 Your Honor to, to review the cases and the, and the rules  
8 sections that have been referenced this morning and with the  
9 idea that, that the rules provide for disposition of cases  
10 just like this.

11 JUDGE STIRMER: And I would urge the Bureau to  
12 process the application that's pending before them and make a  
13 determination of whether or not it's been timely filed and it  
14 should be consolidated in this hearing. I've said that at the  
15 last conference and if a determination had already been made  
16 on that this case would have been advanced. I mean, you can  
17 go along two tracks, a settlement track and a processing  
18 track.

19 MR. SCHONMAN: Your Honor, I agree that applicants  
20 sometimes need to keep their feet to the flame in order to  
21 spur a settlement. We have tried to encourage that. The  
22 parties have been -- have met with, with Bureau counsel and  
23 other Bureau members to discuss settlement. We've floated a  
24 number of, of ideas back and forth and proposals. Frankly, I  
25 think the time has come for some action and, and I think -- as



1 I've said, that action I think requires you to take the first  
2 step and, and send the application back to the processing line  
3 where, where the Bureau can do what is required of the Bureau,  
4 to process both the, the KLON application and to place the  
5 Santa Monica on cutoff.

6 MR. PAPER: Can I interject, because I think we've  
7 hashed this about. If I may address Bureau counsel through  
8 you, Your Honor. Whether the Bureau would support a motion to  
9 the judge which Your Honor would have to consider is to  
10 certify the matter to the Commission, might require -- involve  
11 a waiver of rules. But why don't we just -- it would be a  
12 motion that you could rule on, it would be unusual, and let's  
13 just do that? We could file a joint motion to -- and let's  
14 just ask the -- make a request to the judge, ask -- and if the  
15 Bureau would support that motion and then the judge can have  
16 some time to think about it and consider it. I know --

17 JUDGE STIRMER: If you, if you all agree that it  
18 would be beneficial to the resolution of this case to get the  
19 legal issue presented to the Commission, if you agree on a  
20 statement of the facts, a statement of the rules and the legal  
21 issue that's presented and that that precise legal issue  
22 should be certified to the Commission because it's a case of  
23 first impression and I will consider something like that.

24 MR. SCHONMAN: Your Honor, I have to check with my  
25 client to find out if that's the proper course that my client